

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

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COMMERCE COMMISSION

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CHIEF CLERK'S OFFICE

Illinois Commerce Commission

On Its Own Motion

-vs-

KMS Morris Power, Inc.

Investigation of compliance with Order
granting QSWEF status.

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03-0607

**RESPONDENT'S REPLY IN SUPPORT OF
BRIEF ON EXCEPTIONS TO PROPOSED ORDER**

Respondent, LePetomane VI, Inc., not individually but solely as Receiver for KMS Morris Power, Inc. (the "Receiver"), by and through its counsel Louis D. Bernstein and Theodore F. Kommers, hereby submits its Reply in Support of its Brief on Exceptions to Proposed Order and states as follows:

I. Notice and Waiver Issues.

In its brief filed on April 5, Staff offered a single paragraph on these two issues combined. Importantly, Staff leads off by stating "Staff does not take the position that notice can be waived." Brief on Exceptions of the Staff of the Illinois Commerce Commission at 5. Nor does Staff contest the fact that neither its Staff Report dated July 30, 2003 nor the Commission's Initiating Order sought, or threatened, an assessment of the amount of tax credit reimbursements owed by KMS Morris or a monetary judgment for repayment of those credits. The only relief sought by the Staff Report and contemplated by the Initiating Order was revocation of KMS Morris's QSWEF status. Staff offers no authority (because none exists) to suggest that it is procedurally or constitutionally permissible to assess a \$1.4 million judgment in the absence of a request for monetary relief. To the contrary, all relevant authority holds the exact opposite. See authority cited by Respondent in its Brief on Exceptions to Proposed Order at pp. 4-7. The

Illinois Administrative Code, itself, makes clear that it is not designed to abridge constitutional rights. "This Part [ICC Rules of Practice] shall not be construed to abrogate, modify or limit any rights, privileges or immunities granted or protected by the Constitution or laws of the State of Illinois or the United States." Ill. Admin. Code tit. 83, § 200.20.

The only argument offered by Staff is that the issue of repayment of tax credits is "intertwined" with the investigation of whether KMS Morris's QSWEF status should be revoked. This is sheer nonsense and, of course, Staff offers no authority to support this novel approach to Constitutional due process rights.

II. Response to Staff's Exceptions.

Staff asks that two sets of penalties be imposed. One, for failure to meet the reporting requirement beginning as of April 1, 2001 at \$500 per day (totaling about \$550,000) and two, for the failure to establish a reimbursement fund beginning as of July 1, 2000 at \$2,000 per day (totaling about \$2.8 million). Accordingly, Staff seeks approximately \$3,347,500 in penalties – over twice the amount Staff appears to believe is owed in tax credit reimbursements.

With respect to the start dates of the penalties, Staff's entire argument that they should begin on April 1, 2001 and July 1, 2000, instead of October 25, 2003, rests on the notion that because the Receiver submitted a Notice of Withdrawal of Defense, "the Commission can reasonably infer that KMS Morris intentionally violated the Commission's Order." However, Staff offered no evidence, whatsoever, relating to mens rea or the "intent" of anyone. There is absolutely no authority, and Staff does not argue that any exists, under 220 ILCS 5/5-202 (or any case or authority construing that section) that a withdrawal of defense, or other admission of liability, supports an inference, much less a finding, of intentional violation of Commission orders. Staff has known since the inception of this proceeding that the Receiver has had no

contact with any of the principals of KMS Morris and was unable to determine why certain Commission orders may not have been followed. There is no authority to reach back in time further than section 5/5-202's standard penalty start date of 15 days after mailing notice of the proceeding, October 25, 2003.

Second, concerning the amount of the penalty assessed, for the reasons stated above, there is no basis to raise it from \$500 per day to \$2,000. Additionally, Staff argues that the amount and start date are appropriate because KMS Morris should have begun funding its reimbursement fund a month after first selling power. The Qualifying Order mentioned nothing concerning when, during any given year, funds were to be deposited to the reimbursement fund or even how much money should be put in the reimbursement fund. Lastly, the Qualifying Order does not include the establishment of a reimbursement fund in either the "findings" or "ordering" paragraphs. While Finding 9 relates to filing a report, Finding 9 is not included in the "ordering" paragraphs. Triggering multi-million dollar penalties as the Staff suggests is inappropriate and unwarranted in these circumstances. The Receiver did not object to the penalty, a single \$500 per day fine from October 25, 2003, and respectfully requests that the Commission leave it as drafted in the Proposed Order.

WHEREFORE, the Receiver respectfully requests that the Administrative Law Judges' Proposed Order be revised in accordance with the facts and recommendations contained in the

Receiver's Brief on Exceptions to Proposed Order filed April 5, 2004, and that such other and further relief be granted in KMS Morris's favor as deemed appropriate.

Respectfully Submitted,

**LE PETOMANE VI, INC., not
individually, but solely as the duly
appointed Receiver**

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By: 

One of its Attorneys

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On Its Own Motion	:	
-vs-	:	
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	:	03-0607
Investigation of compliance with Order	:	
granting QSWEF status and with	:	
Sec. 8-403.1 of the Public Utilities Act	:	

NOTICE OF FILING

To: See Attached
Certificate of Service List

Please take notice that on April 9, 2004, we forwarded for filing with the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, the attached **Respondent's Reply in Support of Brief on Exceptions to Proposed Order**, in the above captioned matter.

Respectfully Submitted,

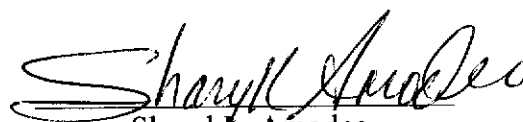
**LE PETOMANE VI, INC., not
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appointed Receiver**

By: 
One of its Attorneys

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CERTIFICATE OF SERVICE

I, Sharyl L. Amodeo, a non-attorney, state, pursuant to §1-109 of the Code of Civil Procedure, that I caused copies of **Respondent's Reply in Support of Brief on Exceptions to Proposed Order** upon the ICC located at 527 East Capitol Avenue, Springfield, Illinois 62701, via overnight mail, and to the remaining persons on the service list via electronic mail and regular mail, this 9th day of April, 2004, before the hour of 5:00 p.m.


Sharyl L. Amodeo

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